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Grappling with the Meaning of “Testimonial”

Richard D. Friedman[†]

I. INTRODUCTION

*Crawford v. Washington*¹ has adopted a testimonial approach to the Confrontation Clause of the Sixth Amendment. Under this approach, a statement that is deemed to be testimonial in nature may not be introduced at trial against an accused unless he has had an opportunity to cross-examine the person who made the statement and that person is unavailable to testify at trial. If a statement is not deemed to be testimonial, then the Confrontation Clause poses little if any obstacle to its admission.² A great deal therefore now rides on the meaning of the word “testimonial.”

[†] Ralph W. Aigler Professor of Law, University of Michigan Law School; rdfriedman@umich.edu. I comment further on questions related to the topic of this paper on The Confrontation Blog, www.confrontationright.blogspot.com. I have filed a petition for certiorari in *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *petition for cert. filed* (U.S. Aug. 5, 2005) (No. 05-5705), one of the cases discussed in this article. Though my views on the confrontation right continue to evolve, I do not believe I have been led to any of the views expressed in this article by the fact of this representation. A draft of the article completed long before I undertook the *Hammon* representation is available on The Confrontation Blog, <http://confrontationright.blogspot.com> (Feb. 16, 2005, 17:18 EST).

¹ 541 U.S. 36 (2004).

² *Id.* at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”). As far as I am aware, only one post-*Crawford* decision has held, with respect to a statement that was not excluded by the governing hearsay rules, that the statement was not testimonial and yet was barred by the Confrontation Clause – and there the trial court’s error in admitting the statement was deemed harmless. *State v. Lawson*, No. COA04-564, 2005 WL 2276520, at *3-5 (N.C. Ct. App. Sept. 20, 2005). In *Miller v. State*, 98 P.3d 738, 748 (Okla. Crim. App. 2004), the court also found a statement to be non-testimonial yet violative of the Confrontation Clause, but it appears that the *Miller* court reached the confrontation issue without deciding whether the rule against hearsay would require exclusion. Moreover, at least arguably, the courts in both of these cases applied unduly narrow views of the meaning of “testimonial.” My thanks to Andrew Fine for alerting me to both cases.

Those of us who previously advocated the testimonial approach thus find ourselves in a position somewhat like that of an opposition politician who suddenly wins election and has to deal with the realities of government. It is relatively easy to carp from the outside about what is wrong with the old regime, to present an alternative approach in general terms, and to offer a few illustrations of how that approach may work in real situations. Actually resolving the daily flood of issues as they arise may be considerably more difficult. Before *Crawford*, the prevailing doctrine was the unsatisfactory rule of *Ohio v. Roberts*,³ under which the key question for confrontation purposes was whether the statement should be deemed sufficiently reliable to warrant admissibility.⁴ In that context, it was possible to advocate a wholesale doctrinal transformation and adoption of a testimonial approach without going into too much detail as to what “testimonial” means. But now that *Crawford* has adopted the testimonial approach, actual cases must be decided under it, and many of them. Pretty quickly, we are going to have to get to a much fuller understanding of the meaning of “testimonial.”⁵

Of course, the analogy cannot be pushed too far. *Crawford*, unlike many elections, did not put anybody in power who was not already. Academics, commenting from the sidelines, have neither the opportunity nor the responsibility to decide cases. But I believe the transformation achieved by *Crawford* was correct, and I want it to succeed. I am therefore happy to take this opportunity to reflect at some length on the question of what statements should be deemed testimonial for Confrontation Clause purposes. I cannot offer in this article a resolution for every possible situation posing an issue of whether a statement should be deemed testimonial. Rather, I hope to present a broad conceptual approach to the meaning of “testimonial” and an overview of how several critical issues in construing the term should be resolved.

³ 448 U.S. 56 (1980).

⁴ *Id.* at 66.

⁵ Chief Justice Rehnquist said as much in his separate opinion in *Crawford*, 541 U.S. at 75 (“[T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of ‘testimony’ the Court lists . . . is covered by the new rule. They need them now, not months or years from now.”) (Rehnquist, C.J., concurring). Prompt answers would, of course, be useful to judges, defense lawyers, defendants, and other participants in the criminal justice system – including the police officers who conduct initial interviews – as well as prosecutors.

Many of my arguments stem from one central insight, which can be summarized this way: Many courts and commentators have attempted to define testimonial by starting at a core of statements that includes trial testimony and then working outwards. But this is a bad approach because the whole point of the confrontation right is to bring testimony to trial, or some other formal proceeding.

Parts II and III of this article develop this thought. In Part II, I contend that the purpose of the Confrontation Clause is to assure that prosecution testimony be given under prescribed conditions, most notably that it be in the presence of the accused and subject to cross-examination. Part III examines the tendency of some courts, in determining whether a statement is testimonial for purposes of the Clause, to ask whether the statement bears a set of characteristics resembling trial testimony. Rather, I argue, the courts should ask whether the statement fulfills the function of prosecution testimony. That function, in rough terms, is the transmittal of information for use in prosecution.

Parts IV through VI address the question of the perspective that should be used in determining whether a statement is testimonial. Part IV argues that the critical question is not the purpose for which the statement was given or taken. Rather, the basic question is one of reasonable anticipation at the time the statement was made – whether at that time it appeared reasonably probable that the statement would be used in prosecuting or investigating crime. As discussed in Part V, it is a matter of secondary, though still substantial, importance whether the test is objective or subjective – that is, whether it depends on the actual expectation of the given actor or on the expectation of a reasonable person in the position of that actor. Part VI argues that whether a statement is testimonial must be determined from the perspective of the person who made it – the witness.

Parts VII, VIII, and IX examine several considerations that may support the conclusion that a statement is testimonial, but the absence of any one or more of which does not mean that a statement is not testimonial. Thus, a statement can be testimonial even if it is (a) not made to a government agent; (b) made at the initiative of the witness, rather than in response to interrogation; or (c) made in an informal setting. Part X argues that a statement may be testimonial even if it is made in great excitement shortly after the event in question. Lastly, I discuss the difficult problem of

child declarants in Part XI. Some very young children should perhaps be considered too undeveloped to be capable of being witnesses. In the case of children who are capable of being witnesses, how to determine whether the given statement is testimonial may often depend on whether a subjective or objective approach is used.

At the outset, it may be useful to comment on the intellectual orientation of this article. My aim is to develop a conception of the Confrontation Clause that is theoretically sound, that can be implemented practically, and that leads to sensible results that are defensible and, at least for the most part, intuitively appealing. I try to get to that point from both ends, theoretical and practical. To some extent I support particular doctrinal approaches by arguing that as a matter of principle they are superior, and to some extent I do so by showing how they lead to satisfactory results. Both aspects, I believe, are essential. An argument from principle alone might be radically indeterminate and could prove to be most unsatisfactory when set in the crucible of actual cases.⁶ An argument based only on results would lack any connecting thesis and so would hardly have any predictive or persuasive power.

II. THE CONDITIONS OF TESTIMONY

If a system of adjudication is to depend in large part on the testimony of witnesses – which any rational system ultimately does – then almost by definition it must determine the conditions under which testimony may be given. That is, an adjudicative system would hardly warrant that designation if it provided:

Anybody who wishes to testify against a criminal defendant may do so however she wishes. She may, for example, do so in open court, but if she does not wish to testify in that way she may make a statement to the police, or submit a written statement or a videotape directly to the court, or she may make a statement to a friend with the understanding that the friend will relay it to court.

One *can* imagine, because it has happened, different rules for giving testimony. For example, many systems, but

⁶ See, e.g., *State v. Wright*, 701 N.W.2d 802 (Minn. Aug. 11, 2005), *discussed at* The Confrontation Blog, <http://confrontationright.blogspot.com> (Aug. 18, 2005 09:29 EST) (purporting to apply a broad definition of the term testimonial, but yielding a very narrow conception).

not all, have insisted that testimony be given under oath.⁷ A system might provide, as the later Athenians did, that testimony be written and placed into a sealed container, thus allowing the parties to know before trial what the body of evidence would be.⁸ Or it might provide, as many Continental courts have done, that testimony must be recorded out of the presence of the parties, to prevent intimidation.⁹ The English took another course, one that the Hebrews,¹⁰ the earlier Athenians,¹¹ and the Romans¹² had followed: They insisted that witnesses give their testimony "face to face" with the adverse party. This practice was not universally followed, especially in politically charged cases, but by the middle of the seventeenth century it was firmly established even in that context. By then it was also clear that the defendant could question the witness. And even before then, and for long after, English commentators proudly proclaimed this method of giving testimony as one of the chief superiorities of the English system of criminal justice over its Continental counterparts.¹³ The practice took on even greater significance in America, where the importance of defense counsel and cross-examination became established sooner. Shortly after declaring independence, the American states made the practice a right protected by their constitutions, and in 1791, in the Sixth Amendment, so did the United States.¹⁴

⁷ See, e.g., Helen Silving, *The Oath*, 68 YALE L.J. 1329 (1959) (discussing the history of the oath in various judicial systems).

⁸ STEPHEN TODD, THE SHAPE OF ATHENIAN LAW 128-29 (1993); 2 DEMOSTHENES, PRIVATE ORATIONS 46:6, at 247-49 (A.T. Murray trans. 1939). ("The laws . . . ordain that [a witness's] testimony must be committed to writing in order that it may not be possible to subtract anything from what is written, or to add anything to it.").

⁹ Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1202-03 (2002) [hereinafter Friedman & McCormack, *Dial-In*].

¹⁰ Deuteronomy 17:6, 19:15-18; Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022-23 & n.64 (1998) [hereinafter Friedman, *Search*].

¹¹ Stephen Todd, *The Purpose of Evidence in Athenian Courts*, in NOMOS: ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY 19, 29 (Paul Cartledge et al. eds., 1990).

¹² Acts 25:16 quotes the Roman governor Festus as declaring: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." See *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988).

¹³ See Friedman, *Search*, *supra* note 10, at 1023-24 n.69.

¹⁴ See Friedman & McCormack, *Dial-In*, *supra* note 9, at 1206-07; Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 112-16 (1995) (arguing that before the Sixth Amendment, several

Several points from this brief historical review bear emphasis. First, the inquiry under the Confrontation Clause is not best conceived in the terms that some writers (including myself) have used, as a determination of what hearsay – some, but less than all – should be excluded as a matter of constitutional law. The right articulated by the Confrontation Clause predated the development of the hearsay rule, and it has existed in adjudicative systems that do not have a rule resembling our rule against hearsay. The confrontation right is really a fundamental rule of procedure, providing that if a person acts as a witness against an accused then the accused has a right to confront her. To act as a witness means to testify, or to make a testimonial statement; although the English words “witness” and “testimony” do not resemble each other, their counterparts in many other languages come from the same root and show the near identity between the two.¹⁵ Thus, to make the question of whether a statement is testimonial, the key criterion in applying the Confrontation Clause is not merely a matter of choosing a convenient term that will help distinguish between categories of hearsay. If a statement is testimonial, then the maker has acted as a witness, and so the statement is within the purview of the Confrontation Clause. If the statement is not testimonial, there may nevertheless be good reasons to exclude it – the lack of an opportunity to cross-examine the declarant may be a significant factor weighing in favor of exclusion – but the statement is simply not within the scope of the Confrontation Clause.

Second, the Confrontation Clause is a guarantee rather than merely a prohibition. *Crawford* said that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”¹⁶ That is correct in the sense that the civil-law method was the one most salient to the Framers: It had been used in some English and American courts and the Framers and their forebears found it highly objectionable. But certainly the Confrontation

states adopted provisions protecting the confrontation right, as well as other procedural rights, as a result of the adversarial nature of American trials).

¹⁵ For example, a witness in French is *un témoin*, and testimony is *témoignage*; in German, the words are *zeuge* and *zeugnis*. The French translation can be found at Babel Fish Translation, <http://babelfish.altavista.com/>. The German translation is available at LEO English/German Dictionary, <http://dict.leo.org/>.

¹⁶ *Crawford v. Washington*, 541 U.S. 36, 50 (2004).

Clause did not mean to provide that any method of giving testimony would be acceptable, so long as it did not resemble the civil-law method. It did not mean, for example, to endorse the later Athenian method of putting testimony in written form in a pot that was kept sealed until trial; nor did it mean to allow a witness to use a trusted confidante as a conduit for passing her testimony on to court. Had the Confrontation Clause been meant only to prohibit a given form of procedure, it could have been written to do so; there are many such clauses in the Constitution,¹⁷ including in the Bill of Rights.¹⁸ But the Confrontation Clause is an affirmative guarantee; it ensures that "the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁹ If a given procedure for presenting the testimony of a witness does not provide that right, it violates the Clause, no matter how dissimilar that procedure may be to the civil-law method. Thus, courts that, like *State v. Davis*,²⁰ treat a statement as *per se* non-testimonial if it "cannot accurately be described as an ex parte examination or its functional equivalent"²¹ apply too narrow a conception of what statements are testimonial.

Third, the view presented here means that the conundrum that plagues originalist views of the Constitution in other contexts – trying to determine what rule the Framers prescribed for a situation that they could not anticipate – really is not a problem with respect to the Confrontation Clause. No matter how unfamiliar a given type of hearsay may have been to the Framers, the originalist question posed by the Clause is a simple one: Would admitting this statement against the accused amount to allowing a witness to testify against him without being subjected to confrontation? I do not mean to advocate originalism as a dominant principle of constitutional interpretation, but only to say that in this particular context it works quite well. The passage of more than two centuries has not substantially altered our insistence that prosecution witnesses give testimony by one prescribed method – under

¹⁷ Note, for example, the Bill of Attainder Clause, U.S. CONST. art. I, § 9, cl. 3.

¹⁸ Note, for example, the Fifth Amendment, U.S. CONST. amend. V.

¹⁹ U.S. CONST. amend. VI.

²⁰ 111 P.3d 844, 850 (Wash. 2005), *petition for cert. filed* (U.S. Jul. 8, 2005) (No. 05-5224).

²¹ *Id.* at 850.

oath, face-to-face with the accused, and subject to cross-examination.²²

III. A FUNCTIONAL RATHER THAN DESCRIPTIVE APPROACH

Part II has shown that there are many ways in which prosecution testimony could be given, but that the Confrontation Clause insists on one – face-to-face with the accused and subject to cross-examination. It therefore makes no sense to determine whether a statement is testimonial by asking whether the statement shares key characteristics with trial testimony. The very point of the Clause is to ensure that testimony will be given at trial, or at some other proceeding that maintains the essential attributes of trial testimony. To say that a statement is beyond the reach of the Confrontation Clause because the circumstances in which it was given do not resemble a trial therefore turns logic on its head. It means that the more that a statement fails to satisfy the conditions for testimony prescribed by the Confrontation Clause, the less likely the Clause will address the problem.

Thus, a characteristic-based approach to the question of what is testimonial – that is, one that depends on whether the statement has similar characteristics to trial testimony – lacks logic and historical foundation. A critical practical factor also weighs decisively against it. If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment, simply by avoiding those characteristics. We have seen this already. Some courts have indicated that even if a statement made knowingly to the police accuses a person of a crime, it is not testimonial unless it is the product of a formal interrogation conducted after the police have determined that a crime has been committed.²³ Some

²² New technologies have presented the troubling issue of whether confrontation requires that the witness and the accused always be in the same room with each other. *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 851 (1990); Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695 (2002) (commenting on proposal to allow testimony from a remote location). But even to the extent the answer is negative, the change created by sometimes allowing testimony from a remote location is a relatively small alteration of the traditional procedure for presenting testimony.

²³ *E.g.*, *State v. Alvarez*, 107 P.3d 350, 355-56 (Ariz. 2005); *State v. Hembertt*, 696 N.W.2d 473, 483 (Neb. 2005), *petition for cert. filed* (U.S. Aug. 19, 2005) (No. 05-5981).

courts have held that, so long as the police can be deemed to have been assessing and securing the scene, even a statement making an express criminal accusation is not testimonial.²⁴ As a result, we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a formal interrogation.²⁵

These difficulties are all solved if, instead of relying on a pre-determined checklist of characteristics, the determination of whether a statement is testimonial depends on whether it performs the function of testimony. That approach allows the Confrontation Clause to perform its historically-supported function, assuring that however testimony has been given it will be proscribed unless it satisfies the demands of the Clause. And it deprives repeat players of the ability or incentive to manipulate because they cannot change the status of a statement under the Clause by shaping the circumstances in which the statement is given unless they defeat their own purposes by depriving the statement of testimonial value.

This approach does, of course, require the articulation of what the testimonial function is, and then implementation of that standard. I will concentrate here on the first step. A useful articulation, I believe, is that a statement is testimonial if it transmits information for use in litigation. In the context of importance to the Confrontation Clause, this usually means that the statement transmits information for use in a criminal prosecution.²⁶ (I am using "for" as a shorthand; as explained

²⁴ *E.g.*, *Hembertt*, 696 N.W.2d, at 483; *Hammon v. State*, 829 N.E.2d 444, 457-58 (Ind. 2005), *petition for cert. filed* (U.S. Aug. 5, 2005) (No. 05-5705); *Spencer v. State*, 162 S.W.3d 877, 882 (Tex. Ct. App. 2005).

²⁵ *Sample Crawford Predicate Questions*, VOICE (APRI's Violence Against Women Program, Alexandria, Va.), Nov. 2004, at 8-9, *available at* http://www.ndaa-apri.org/pdf/the_voice_vol_1_issue_1.pdf (proposing that police officers be asked predicate questions at trial such as: "Were the statements taken during 'the course of an interrogation?'" "Were your questions to her an interrogation or merely part of your initial investigation?"; "Were these questions asked in order to determine whether a crime had even occurred?").

²⁶ This is not inevitable, though. At the argument of *Crawford*, Justice Kennedy posed this interesting hypothetical: Criminal charges are brought arising from a serious auto accident, and the prosecution offers a statement made shortly after the accident by an observer to an insurance investigator. The statement could clearly be characterized as testimonial with respect to civil litigation, whatever the consequences of such a characterization might be. Should it be considered testimonial for purposes of the Confrontation Clause? Transcript of Oral Argument at 5, *Crawford*, 541 U.S. 36 (Nov. 10, 2003), 2003 WL 22705281 (No. 02-9410). I believe it should, even without requiring proof that the declarant anticipated a criminal prosecution. In other words, given that the declarant made the statement in anticipation of litigation, it probably should be considered testimonial as a general matter, and therefore also for Confrontation Clause purposes, even without a showing that the declarant anticipated

below, I do not believe the statement needs to have been made *for the purpose* of aiding a criminal prosecution to be deemed testimonial.)²⁷

Note that “use in a . . . prosecution” is a somewhat looser wording than, say, “use as evidence at trial” (which resembles a wording I have used on at least one occasion²⁸). Two reasons justify this choice. First, I think it is better as a matter of principle. A great deal of criminal procedure occurs before trial – the vast majority of cases never go to trial – and evidence provided to the authorities can be useful to them and help them secure a conviction long before trial. The trial is when the confrontation right can most often be invoked – in fact, this is a great deal of what makes a trial, given that the confrontation most often occurs in the presence of the fact-finder – but the information may have performed its inculpatory function well beforehand. Indeed, it seems the confrontation right should be independent of a right to trial. Even if there were no proceeding recognizable as a trial – even if all testimony were recorded and delivered piecemeal behind

use in prosecution. An alternative and plausible rule would require a demonstration that the declarant anticipated prosecutorial use. In most cases, I suspect, such a showing could be made: If the circumstances were serious enough to warrant prosecution, and the declarant’s statement aided that prosecution, the declarant, or a reasonable person in the position of the declarant, would probably have anticipated that prosecution was a significant possibility.

²⁷ Also, I will not explore beyond this footnote the question of *what* prosecution will satisfy this definition. Does the defendant have to be identified at the time of the statement? Not necessarily; it may be apparent when a statement is made that it is likely to be useful to the prosecution, perhaps in proving that a crime has in fact been committed, even though the perpetrator has not yet been identified. What if the statement is made with one crime in mind and is later introduced at a trial for a later-committed crime? If there is a substantial link between the two, that should probably be enough; I have in mind the cases in which a statement is made in the context of an incident of domestic violence, and the complainant is later murdered. Forfeiture doctrine would often nullify the confrontation right in this context, though. *See, e.g.,* *People v. Giles*, 19 Cal. Rptr. 3d 843, 847-48 (Cal. Ct. App. 2004) *review granted*, 102 P.3d 930 (Cal. 2004). Does any crime have to have been committed yet? Not necessarily: here I have in mind the cases in which an eventual murder victim, fearing her assailant, tells a confidante information to be used in the event that he does in fact assault her and render her unable to testify. *See State v. Cunningham*, 99 P.3d 271, 274 (Or. 2004). Again, forfeiture is probable in this situation.

²⁸ *See* Friedman, *Search*, *supra* note 10, at 1039 (asserting ambiguously that if “the declarant correctly understands that her statement will be presented at trial” the statement is testimonial, but that it is not testimonial if “the declarant correctly understands at the time she makes the statement that it will play no role in any litigation”). *Cf.* Friedman & McCormack, *Dial-In*, *supra* note 9, at 1240-41 (suggesting as a workable standard: “If a statement is made in circumstances in which a reasonable person would realize that it likely would be used in investigation or prosecution of a crime, then the statement should be deemed testimonial.”).

closed doors to a fact-finder – the accused should have a right to confront the witnesses.

Second, this approach has the practical advantage of helping us avoid a bothersome Catch-22. Suppose the governing doctrine makes admissibility at trial the critical factor determining whether a statement is testimonial. Suppose also that the jurisdiction assiduously protects the confrontation right. This means that it will exclude testimonial statements (unless the accused has had an opportunity to cross-examine and the declarant is unavailable). But then a statement that otherwise would be testimonial will not be under the hypothetically governing law – for the very reason that it is inadmissible at trial and so cannot be testimonial under that law. But then if it is not testimonial it presumably could be admitted . . . and so on. One could construct a complicated contingent question to try to avoid this infinite regress. It is far simpler, though, to avoid the whole problem simply by speaking in terms of use of the information in prosecution generally rather than specifically at trial.

IV. ANTICIPATED USE

I have contended that, in rough terms, testimony is the transmittal of information for use in prosecution. Necessarily, then, the determination of whether a statement is testimonial examines the situation as of the time the statement is made. A standard that labeled a statement as testimonial because it was actually used in prosecution would make no sense; it would mean that any out-of-court statement offered by the prosecution at trial to prove the truth of what it asserts – that is, any hearsay – is testimonial.

To determine whether a statement is testimonial, therefore, we must figuratively stand at the time of the statement and look forward in time towards the prosecutorial process. Now, let us assume for the sake of argument a point that I will try to demonstrate in Part VI, that in doing so we should take the perspective of the declarant, the purported witness. And for the moment I will assume also that in taking that perspective it is the actual state of mind of the witness – rather than the state of mind of an hypothesized reasonable person – that matters. The question I will address here is what state of mind is necessary for the statement to be deemed testimonial.

It may be tempting to conclude, as some courts have done, that the statement is testimonial only if it was made *for the purpose* of transmitting information to be used in prosecution.²⁹ But of course people often make statements for multiple purposes, and so this test would immediately raise the question of how important that purpose must be for the statement to be deemed testimonial: The *dominant* purpose? A purpose? Something in between, such as a *decisive, but-for* purpose, absent which the statement would not have been made? I think none of these should be the test. Instead, the question is whether the declarant *understood* that there was a significant probability that the statement would be used in prosecution. In other words, the test is one of anticipation; one might speak of it as an intent test, but only in the soft sense that a person is deemed to have intended the natural consequences of her actions.

I believe this anticipation test is preferable to a purpose test for several reasons. First, as a matter of principle, it better describes the testimonial function. Suppose, to put aside for the moment several other issues, a witness gives a statement to the police describing the commission of a crime in circumstances like those of *Crawford*. If the statement is made in the station house in response to formal and structured questioning by the police, it is undeniably testimonial. The reason, I believe, is that the witness must have understood (as did the police) that the statement was transmitting information for use in prosecution. This conclusion would remain the same even if we found out that the witness only gave the statement under pressure, because she thought doing so would help her own status with the authorities; or that, feeling personal sympathy with the defendant, she hoped even while making the statement that it would never be used; or that she made the statement primarily for the purpose of personal catharsis, or expiation, or to secure her immediate personal safety. In each case, this other purpose would have been sufficient to explain her conduct even if use of the statement in prosecution were not a possibility. In short,

²⁹ See, e.g., *Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005), (“If the declarant is making a statement to the police with the intent that his or her statement will be used against the defendant at trial, then the statement is testimonial. Similarly, if the police officer elicits the statement in order to obtain evidence in anticipation of a potential criminal prosecution, then the statement is testimonial.”), *petition for cert. filed* (U.S. Aug. 5, 2005) (No. 05-5705).

understanding of the probable evidentiary use, rather than desire for that use, is what makes the statement testimonial.

Second, as a practical matter, the inquiry into anticipation is much easier than an inquiry into motivation. Anticipation depends on, and can be proven by, external circumstances; motivation demands a more searching psychological inquiry.

Third, a test framed in terms of anticipation can be applied on an objective basis. In Section V, immediately following, I will assess the relative merits of a subjective test, which looks to the actual state of mind of the actor, and an objective test, which looks to the state of mind of an hypothesized reasonable person in that actor's position. Both types of test have their merits, but I think it is clear that most courts prefer an objective test. If the test is one of anticipation, it can be applied objectively (What would a reasonable person in that position have anticipated?) as well as subjectively (What did this declarant anticipate?). But if the test is one of motive, it would be hard to apply it coherently except subjectively, on the basis of the witness's actual motivations. To answer the question of what would have motivated a reasonable person who acted as the declarant did in the declarant's position would require positing not only the base of knowledge of that hypothetical person but also a set of values; that makes for an inquiry that is at best very complex.

V. SUBJECTIVE OR OBJECTIVE?

Again, I will assume for now that the perspective of the witness is the crucial one. In Part IV, I have argued that anticipation of use in prosecution is the crucial question. But in answering this question, should we take a subjective or objective view? That is, should we ask whether this particular declarant anticipated use in prosecution, or should we ask whether a reasonable person in the position of the declarant would anticipate such use?

In most cases, I do not think the choice makes very much difference. Assuming the test is a subjective one, a court would still perforce often determine what the declarant's anticipation was by relying largely on surrounding circumstances. In other words, the court would infer that the declarant did (or did not) anticipate use in prosecution from its perception that a reasonable person in the declarant's position would (or would not) anticipate such use.

The subjective approach has the advantage of theoretical simplicity; the objective approach, but not the subjective approach, requires a court to determine both a set of characteristics that it will assume a reasonable person has in this context and a set of criteria defining what it means to be in the declarant's position. The subjective approach is also more intellectually straightforward: It is easier to explain why a statement should be deemed testimonial given that the person who actually made the statement anticipated prosecutorial use than to explain why the statement should be deemed testimonial given that a mythical person who might be quite different from the actual declarant would have anticipated such use.

On the other hand, because it does not entail an inquiry into the actual declarant's state of mind, the objective approach is more likely to yield some categorical rules, and to the extent reasonable rules could be crafted, that would be a welcome development. Not all situations lend themselves to categorical rules, or at least not to simple categorical rules – 911 calls reporting an assault while the assailant is still nearby provide a good example.³⁰ But some situations do. For example, I believe that a statement describing an assault made after the assailant has left to a police officer responding at the scene should, if an objective test is used, be deemed testimonial as a categorical matter.

Even though it is theoretically more complex, therefore, the objective approach is probably simpler in actual implementation, and this factor appears to have made it more attractive to courts. An objective approach is, as I have argued in Part IV, more easily compatible with a definition of testimonial that depends on the anticipation of a reasonable declarant than with a definition that depends on such a declarant's motivation. Apart from this, the chief consequence of the choice between an objective and subjective approach may well be in the context of child witnesses. As I shall show in Part XI, an objective approach would tend to characterize more statements by children as testimonial than would a subjective approach.

³⁰ See *infra* Part X.

VI. THE PERSPECTIVE OF THE WITNESS

I have argued in Part IV that anticipation of use in prosecution is the key question in determining whether a statement is testimonial. But whose anticipation? The declarant's? Governmental authorities'?³¹ Both – so that a statement is not deemed testimonial unless both the declarant and governmental authorities anticipate use in prosecution? Either – so that a statement is deemed testimonial if either the declarant or governmental authorities anticipate use in prosecution? I will contend here that it is the perspective of the declarant – the witness – that matters. (For simplicity of expression, I will speak here as if it is the actual anticipation of the declarant that is material – that is, that a subjective test is used – though the test could be objective or subjective, as discussed in Part V.) In this Part, I will contend that the fact that governmental authorities are gathering evidence for use in prosecution does not make a statement testimonial if the declarant does not understand that this is happening. In Part VII, I will argue that if the declarant does anticipate that the statement will be used in prosecution, that is sufficient, even if the statement was not made to a governmental agent. In short, government involvement in the production of the statement is neither sufficient nor necessary to make the statement testimonial.

This is a contentious area. I will approach it first by showing that making the intentions or anticipation of government agents *the* dispositive consideration, or a sufficient factor to characterize the statement as testimonial, would lead to some unappealing results – and unappealing in particular to one arguing from a pro-prosecution perspective. A statement by a co-conspirator of the defendant, made for the purpose of furthering the conspiracy but to an undercover police agent, was clearly admissible under pre-*Crawford* law. I suspect that the Supreme Court would be loath to adopt any theory that would entail a change in this result.³² But if the intention of a government agent to gather evidence for use in prosecution is

³¹ With respect to governmental authorities, it would not much matter whether the test were phrased in terms of purpose or anticipation; it would rarely occur that a government agent would take a statement with the anticipation, but without the purpose, that the statement be used in prosecution.

³² See Transcript of Oral Argument at 13-14, *Crawford*, 2003 WL 22705281 (No. 02-9410).

the critical consideration, then such a statement is clearly testimonial, for that is precisely what the agent is trying to do. So what makes the statement non-testimonial? Clearly it is that the *declarant* did not anticipate a prosecutorial use of the statement.

Similarly, consider the cases in which police intercept calls to a drug or gambling house, either by answering the telephone and playing the role of an order-taker or by monitoring an answering machine; the callers, unaware that they are speaking to the police, place their orders or make communications otherwise indicating their awareness of the business performed at the house. The American cases were in consensus before *Crawford* that these utterances are admissible,³³ and that is the proper result. But any attempt to contend that the police are not gathering evidence for use in prosecution would be utterly unconvincing. Assuming such an utterance is deemed to be a statement offered to prove the truth of what it asserts, the reason the statement is not testimonial is that the *declarant* did not anticipate prosecutorial use.³⁴

These examples suggest that an intention on the part of a government agent to gather evidence for prosecutorial purposes does not in itself make a statement testimonial. And as a theoretical matter I believe this conclusion is right.

Police and other government agents gather evidence for prosecutorial purposes from many different sources. Think of three categories. Category 1 includes sources of information other than communications by humans – blood, maggots, bloodhounds, DNA tests, skid marks, and so forth. The police may, for prosecutorial purposes, observe a phenomenon of evidentiary significance, and even generate one, but plainly this type of evidence poses no Confrontation Clause problem. By contrast, Category 2 includes statements made to government investigators by declarants who know the investigators are gathering evidence for prosecutorial purposes. This type of evidence seems clearly to be testimonial within the

³³ See, e.g., *United States v. Oguns*, 921 F.2d 442, 448-49 (2d Cir. 1990); *United States v. Long*, 905 F.2d 1572, 1579-80 (D.C. Cir. 1990); *United States v. Zenni*, 492 F. Supp. 464, 465, 469 (E.D. Ky. 1980); *People v. Nealy*, 279 Cal. Rptr. 36, 38-39 (Cal. Ct. App. 1991).

³⁴ Cf. *People v. Morgan*, 23 Cal. Rptr. 3d 224, 233 (Cal. Ct. App. 2005) (treating utterances as hearsay within an exception and holding that admission did not violate Confrontation Clause because – among other, spurious, grounds – of “their unintentional nature”).

meaning of the Confrontation Clause. Category 3 includes statements made by humans who do not realize that their audience is a government investigator gathering evidence for use in prosecution; the classic example is that of a conspirator making a statement to an undercover police officer. I contend that for Confrontation Clause purposes evidence in Category 3 is more like evidence in Category 1, from non-human sources, than like evidence in Category 2, the self-conscious testimonial statement. The critical factor distinguishing Category 2 from Category 1, and also from Category 3, is that only in Category 2 is the source cognizant of the likely prosecutorial use of the statement.

A skeptic may contend that the critical factor distinguishing Category 1 from Category 2 is that one cannot usefully attempt to cross-examine a maggot or a bloodhound, to say nothing of a vial of blood or a skid mark. If that were so, Category 3 would materially resemble Category 2 more than Category 1. And it may seem at first that this view is correct, because of course if a statement is testimonial for Confrontation Clause purposes it cannot be admitted against the accused unless he has had an opportunity to cross-examine the declarant. Nevertheless, I believe this view is wrong. For at least two reasons, the ability of the declarant to be cross-examined is not the hallmark of what *makes* a statement testimonial for Confrontation Clause purposes.

First, there is more to confrontation than cross-examination; though cross-examination has taken on greater importance over time, historically the core of the right, as its name suggests, has been the right of the accused to demand that prosecution witnesses testify in his presence.³⁵ And even now that is an essential aspect of the right.³⁶ Yet no

³⁵ See *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("[T]here is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements [the right of cross-examination and restriction on admissibility of out-of-court statements], whereas . . . simply as a matter of English it confers at least a right to meet face to face all those who appear and give evidence at trial.") (internal citations omitted). Although early Athenian witnesses testified orally at trial, the right to cross-examine appears not to have been invoked frequently. Todd, *supra* note 8, at 29. Note also the declaration of the Roman governor Festus, *Acts* 25:16, *supra* note 12, which insisted on the accuser being brought face-to-face with the accused but says nothing about *questioning* the accuser. See also Friedman, *Search*, *supra* note 10, at 1024-25 n.74 (noting a period in trial of treason cases in which witnesses were brought before the accused but he was not allowed to question them directly).

³⁶ See Statement of Scalia, J., 535 U.S. 1159, 1160 (2002) (explaining reasons for joining majority decision not to transmit to Congress proposed amendment to

confrontation problem is posed by, say, the fact that the accused was not present when the chemicals used in a DNA test were generating their evidence – even though the test was performed by government agents for the purpose of producing evidence for prosecution and it would be possible to demand the accused's presence.

Second, that cross-examination was never possible does not relieve a Confrontation Clause problem if a human statement *is* testimonial. Corpses cannot be cross-examined any more than bloodhounds or maggots can. Suppose that the prosecution takes the deposition of a witness – clearly a testimonial statement – and just before cross-examination is about to start the witness dies of a heart attack, through nobody's fault. If the prosecution offers the deposition transcript at trial, and the accused objects on confrontation grounds, the prosecution could not validly contend, "Cross-examination is not possible now and it never was possible. It is therefore silly to exclude this evidence on the basis that the accused has not had an opportunity for cross-examination and that in some imaginable state of the world he might have had such an opportunity." The court would rule in effect, "Sorry. This evidence doesn't satisfy the conditions for proper testimony. I understand that it was impossible to satisfy those conditions. But that's your tough luck." Courts *could* say something like that when the prosecution wants to prove the reaction of a bloodhound: "Sorry. Cross-examination is not possible. I know there is nothing you can do or could have done to make it possible, but given that it is not possible, this evidence just doesn't satisfy the conditions for testimony." But of course courts do not do that; though in exposing the bloodhound to a bloody shirt the police were trying to secure evidence for use in prosecution, what the bloodhound did by barking is evidence that was solicited by the police, but it is not testifying within the meaning of the Confrontation Clause.

Federal Rule of Criminal Procedure 26(b) that would have allowed testimony from a remote location, subject to cross-examination, in a limited set of circumstances):

As we made clear in [Maryland v. Craig, 497 U.S. 836, 846-47 (1990)], a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence* – which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

And why not? It appears that the essence of testifying is provision of information *understanding* there is a significant probability it will be used in prosecution. The bloodhound lacks the understanding to make his bark testimonial – and so does the conspirator or the unwitting drug customer. Without such understanding on the part of the source of information – whether that source is a human declarant or not – all we can say is that a phenomenon occurred, one that was observed or perhaps even generated by government agents. But that does not make the evidence testimonial. If, by contrast, the source of the information is a human who *does* understand its likely use, we can say that she was playing a conscious, knowing role in the criminal justice system, providing information with the anticipation that it would be used in prosecution – and that certainly sounds a lot like testifying. Furthermore, without such understanding on the part of the declarant, the situation lacks the moral component allowing the judicial system to say in effect, “You have provided information with the knowledge that it may help convict a person. If that is to happen, our system imposes upon you the obligation of taking an oath, saying what you have to say in the presence of the accused, and answering questions put to you on his behalf.”³⁷

In sum, the fact that evidence is created through the participation of a government agent does not make the evidence testimonial. The conduct of the purported witness must be testimonial in nature. A conspirator going about his routine conspiratorial business is not performing a testimonial act, nor is a drug or gambling customer placing an order. To be testimonial, it must appear from the perspective of the witness that the statement is transmitting information that will, to a significant probability, be used in prosecution.

VII. STATEMENTS NOT MADE TO GOVERNMENTAL AGENTS

Part VI has shown that government involvement is not sufficient to make a statement testimonial. But is it necessary? I believe the answer is negative. That a statement is made to a government agent is often a factor supporting a conclusion that

³⁷ See Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258 (2003) (viewing the Confrontation Clause as giving the accused not merely the right to confront the witnesses but primarily the right to demand that the witnesses against him assume the burden of confronting him).

the statement is testimonial. But there is no requirement that the statement be made to such an agent. If the declarant anticipates that the statement, or the information asserted in it, will be conveyed to the authorities and used in prosecution, then it is testimonial, whether it is made directly to the authorities or not.

Once again I will argue both from consequences and from theory. A rule providing that a statement is not testimonial unless it is made directly to government agents would have some consequences that I believe are intolerable. A witness who did not want to undergo the rigors of cross-examination could presumably send a statement to the court, in writing or other recorded form: "Here's what I have to say. Please read it at trial; I don't want to come in person." If that statement were considered testimonial – on a theory that the court is a government agent, and all that is necessary is that such an agent receive the statement directly, not that the agent play a role in procuring the statement – the reluctant witness would still have an easy alternative. She could simply make a statement to a friend and ask the friend, as her agent, to pass the statement on to the authorities or directly to court; even if the friend had to testify subject to cross-examination, that would probably not be a hardship, because she would only be testifying that the reluctant witness made the statement.

In many cases the witness would not even have to take the initiative. I think it is not only plausible but virtually inevitable that, if a government agent standard is established by the courts, private victims' rights organizations will provide a comfortable way for many complainants to create evidence for use in prosecution without having to confront the accused: "Make a videotape, and then go on vacation. We'll bring the tape to court and present the testimony necessary to get the tape shown to the jury. Don't worry, you never have to look the accused in the eye, you never have to answer questions by his attorney, and you don't even have to take an oath." How can the making of that videotape not be considered testimonial?

Similarly, if a dying murder victim says to a private person nearby, "Jack shot me!" I do not believe the statement is made for the edification or amusement of the listener; clearly

it is made to help bring the assailant to justice, and that makes it testimonial.³⁸

These examples suggest that government involvement in the creation of a statement is not necessary to make the statement testimonial. History lends further support to the point. The confrontation right predates the existence of government prosecutors or police. As I mentioned in Part II, the Hebrews, the early Athenians, and the Romans all protected the right of the accused to confront the witnesses against him. In England, state prosecutors did not become the norm for ordinary crime until the nineteenth century,³⁹ but the right to confront was established long before; indeed, in the sixteenth century Thomas Smith described the criminal trial as an "altercation" between accuser and accused.⁴⁰ If today a jurisdiction were to eliminate state prosecutors, returning to a system in which crime was privately prosecuted, I do not believe we would say that this change virtually nullified the confrontation right, allowing a private prosecutor or his agent to gather statements from observers and report them all in court.

Moreover, it makes no sense conceptually to say that a statement must be made to a government agent for it to be deemed testimonial. Granted, there is language in *Crawford* emphasizing prosecutorial abuse.⁴¹ But it must be remembered that it is not prosecutorial authorities who violate the Confrontation Clause. Certainly the authorities do not violate the Clause when they take a statement behind closed doors from a witness. We *expect* the police to take confidential statements; often they would be derelict in their investigatory duty if they did not do so. The violation of the Clause occurs when a testimonial statement is *admitted at trial* against an accused without his being afforded an opportunity to confront the witness. The prosecutor may be said to be complicit in the violation, because presumably it was the prosecutor who sought admissibility. But it is the *court* that commits the violation by deciding to admit the statement notwithstanding

³⁸ The statement may nevertheless be admissible, preferably on the basis that the accused forfeited the confrontation right, but that is another matter.

³⁹ J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 35-36 (1986).

⁴⁰ THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583) (describing a typical criminal trial).

⁴¹ *Crawford v. Washington*, 541 U.S. 36, 55 n.7 ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . .").

the lack of confrontation.⁴² Once again, if we imagine a world without prosecutors, this time a world in which the court gathers evidence against the accused, that should not mean the destruction of the confrontation right; Alice should not be allowed to testify, “Barbara chose not to come here today, but she asked me to relay to you her rendition of what she saw at the crime scene.”

I am only arguing that there is no *per se* rule that a statement cannot be testimonial unless it is made to a government agent; the bottom line question is what the witness anticipated. In some cases, as suggested by the examples I have given above, the anticipation of prosecutorial use is clear even though the statement is made to a private person. In other cases, there will be no good basis for inferring such an anticipation. And clearly, when the statement is made to a prosecutorial agent, that will often be a strong basis for drawing an inference that the declarant anticipated that the statement would be used in prosecution. Sometimes, indeed, the agent will announce this intention. But even if she does not, in some contexts the likely use is obvious from the nature of the statement and the open presence of a government officer. “Our neighbor parked his car strangely yesterday” said to one’s spouse, when nothing else unusual appears to have happened, will probably be characterized as a “casual remark to an acquaintance.”⁴³ But now suppose that what prompted the statement was this question by a police officer: “We’re investigating a murder in the neighborhood. Did you notice anything strange yesterday?” Then the statement seems plainly testimonial.

A rule refusing to deem a statement to be testimonial unless it was made to a government agent might be mitigated by stretching the meaning of “government agent.” Suppose a calm, collected statement to a privately employed 911 operator describing a crime that occurred several hours before. Perhaps

⁴² The court is a state actor, and so the decision to admit the statement constitutes state action, a necessary element under the Fourteenth Amendment, which makes the Confrontation Clause applicable to the states. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 486 (2d ed. 2002) (summarizing the so-called “state action” doctrine: “The Constitution’s protections of individual liberties and its requirement for equal protection apply only to the government [though the Thirteenth Amendment’s prohibition of slavery should be excepted from this broad statement]. Private conduct generally does not have to comply with the Constitution.”).

⁴³ *Crawford*, 541 U.S. at 51.

the 911 operator may be considered a government agent because the company that employs her is under contract with government agencies. Or consider an emergency room doctor, who regularly receives and passes on to the authorities victims' descriptions of crimes. Perhaps she, too, can be considered a government agent, even if she is not a public employee, because she is under a legal obligation to report the statement. But such manipulations are not a satisfactory resolution of the problem because they require generous use of the term "government agent" and because they cannot reach all situations in any event. It would be far better to acknowledge frankly that in some circumstances a statement may be testimonial even though it is not made directly to a government agent.

VIII. INTERROGATION⁴⁴

Since *Crawford*, some courts have said that a statement is not testimonial unless it is made in response to governmental interrogation.⁴⁵ And indeed, some have gone further, refusing to characterize a statement as testimonial unless it meets a restrictive definition of interrogation as "structured police questioning."⁴⁶ This idea has begun to distort police practices, as police try to act in such a way that prosecutors can later argue that statements made to the police were not in response to interrogation.⁴⁷

I believe that the whole supposed interrogation requirement is entirely mistaken. Interrogation – like the participation of a government agent in the making of a statement – is a factor that in some contexts supports an inference that the statement is testimonial, but the statement may be testimonial even though it is not in response to interrogation.

⁴⁴ I have adapted this Part from an entry called "The Interrogation Bugaboo" that I posted on The Confrontation Blog, <http://confrontationright.blogspot.com/> (Jan. 20, 2005, 1:12 EST).

⁴⁵ *E.g.*, *United States v. Webb*, No. DV-339-04, 2004 WL 2726100, at *2-4 (D.C. Super. Ct. Dec. 22, 2004); *People v. Bryant*, No. 247039, 2004 WL 1882661, at *1 (Mich. Ct. App. Aug. 24, 2004), *appeal held in abeyance by* 697 N.W.2d 527 (Mich. 2005).

⁴⁶ *E.g.*, *State v. Barnes*, 854 A.2d 208, 211-12 (Me. 2004); *People v. Newland*, 775 N.Y.S.2d 308, 309 (N.Y. App. Div. 2004), *leave to appeal denied*, 817 N.E.2d 835, 3 N.Y.3d 679, and 821 N.E.2d 981, 3 N.Y.3d 759 (2004).

⁴⁷ See *Sample Crawford Predicate Questions*, *supra* note 24.

Those who contend that interrogation is necessary for a statement to be deemed testimonial have language they can point to in *Crawford*, though it is quickly apparent that the language does not really support them. Sylvia Crawford's statements were made in response to police interrogation, and the Court held that, whatever else the category of testimonial statements might include, statements made in response to police interrogation certainly fall within it. Here are the passages in question, with emphasis added in each case:

[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers *fall squarely within that class*.⁴⁸

Statements taken by police officers in the course of interrogations are also testimonial *under even a narrow standard*. Police interrogations bear a striking resemblance to examinations by justices of the peace in England.⁴⁹

Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.⁵⁰

There is no indication, then, that statements not made during formal testimonial events – a preliminary hearing, grand jury or a former trial – must be in response to police interrogation to be considered testimonial. The Court was very clear that it was merely listing a core class of testimonial statements, a class that plainly includes the statements at issue in the *Crawford* case itself, and was deciding no more than that these statements are testimonial. Left for another day was the question of what additional statements, if any, shall be considered testimonial. It is true that the Court left open the possibility that it will not consider any statements beyond this core class to be testimonial. Indeed, the fact that the Court took the care, in footnote 4, to offer some elaboration on the meaning of “interrogation”⁵¹ confirms that the Court preserved the possibility that the term would in some

⁴⁸ *Crawford*, 541 U.S. at 53 (emphasis added).

⁴⁹ *Id.* at 52 (emphasis added).

⁵⁰ *Id.* at 68 (emphasis added).

⁵¹ There the Court said that it was using the term in a colloquial sense, that it did not have to choose among definitions, and that “Sylvia’s recorded statement, knowingly given in response to structured police questioning, qualifies under any conceivable definition.” *Id.* at 53 n.4.

circumstances be decisive. But that is as far as the Court went in this direction. It offered no intimation that a statement not made in response to interrogation would not be considered testimonial. And it certainly did not suggest that if a statement was not "knowingly given in response to structured police questioning" it would not be testimonial; it merely said that a statement meeting that standard "qualifies under any conceivable definition."⁵²

So *Crawford* does not tell us that a statement must be in response to interrogation to be characterized as testimonial. And common sense tells us that there is no such requirement. Suppose that at trial a prosecutor or the court issues a general invitation: "Anyone who knows anything about this incident, please feel free to come to the front of the courtroom and tell us what you know." After Observer does so, the prosecutor says, "Thank you. You may go." Alertly, defense counsel objects because of a lack of confrontation. "But," says the prosecutor, "this was no witness. I did not subject her to any interrogation." The prosecutor is right that there was no interrogation, but of course we would expect the legal argument to be rejected sneeringly. What Observer was doing was testifying. It does not matter that her statement was not given in response to questions; nor would it matter whether it was she or the prosecutor or the court who took the initiative in arranging for her to give the testimony.

Now suppose the invitation comes not at trial but at the police station: "Ms. Observer, if you care to make a statement, please feel free to do so. I will videotape it, and when this perpetrator stands trial I will give the prosecutor the tape so that she can play it in front of the jury." I think it is equally obvious that a statement made in response to this invitation is testimonial. And now suppose an observer walks into the police station and says, "You don't know about a crime that has been committed, but I am now going to tell you, and I expect that you will then want to prosecute. Please record what I am about to say, because I expect you will want to use it at trial – I do not like the idea of being under oath and having to answer questions by some aggressive defense lawyer." I cannot see a plausible basis on which this statement should not be deemed testimonial. Or suppose the observer walks into the police

⁵² *Id.*

station with an affidavit completed, describing the crime. Does anyone seriously contend that this is not testimonial?

Of course, the statements in these hypotheticals are more formal than in the usual case, in which a witness makes a statement to a police officer in the field, perhaps before the officer is confident that a crime has been committed. But, for reasons that I will analyze in Part IX, formality is not required to render a statement testimonial. If the declarant in that field situation understands full well that once the officer receives the statement it is likely to be used for prosecutorial purposes, then the statement is testimonial. The declarant is creating evidence – and this critical reality is unaffected by the facts that (1) until the moment the statement was made, the police officer was not confident that a crime had been committed, and (2) structured questioning by the officer was not necessary to secure the statement.

The bottom line is that if the declarant is making the statement in a situation warranting a reasonable anticipation of prosecutorial use, it is testimonial, even if it is made without questioning by government authorities or entirely on the witness's own initiative. Interrogation may, however, be a significant factor in indicating that a reasonable person in the position of the declarant would have this anticipation; if the authorities are interrogating, that is a factor that would often convey to the declarant the likelihood of prosecutorial use. But when the declarant is reporting a crime, this factor is not necessary to characterize the statement as testimonial; she knows that she is conveying to the authorities information about a crime, and presumably she understands that they will use that information to invoke the machinery of criminal justice. To hold that such a statement is not testimonial is merely to try to avoid *Crawford* because it makes prosecutions more difficult.

IX. FORMALITY⁵³

Some cases have indicated that a statement cannot be considered testimonial for purposes of the *Crawford* inquiry

⁵³ I have adapted this Part from an entry called “The Formality Bugaboo” that I posted on The Confrontation Blog, <http://confrontationright.blogspot.com/> (Jan. 2, 2005, 12:55 EST).

unless it was made formally.⁵⁴ Once again, I believe this view represents a misunderstanding of *Crawford*, and of the basic approach to the confrontation right that *Crawford* reflects.

Again, courts adopting this rule can find some language in *Crawford* to cite in their support, though ultimately, once again, the attempt is unavailing. First, drawing on a definition given by Noah Webster, Justice Scalia wrote that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"⁵⁵ Second, Justice Scalia then offered this contrast: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."⁵⁶ Third, one of the three formulations of the class of testimonial statements presented by Justice Scalia is the one adopted by Justice Thomas (with Justice Scalia himself joining) in his separate opinion in *White v. Illinois*: "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions."⁵⁷

Even on their face, none of these three passages adopts a formality rule. The Court did not say that testimony must be a solemn declaration; it said that testimony typically *is* such a declaration. The two polar categories, "a formal statement to government officers" and "a casual remark to an acquaintance," plainly do not exhaust all possibilities, and so presenting these two does not indicate where the boundary between testimonial and non-testimonial lies. As for the Thomas formulation, it is only one of three alternatives presented by the Court, and the only one that includes a formality rule. Moreover, it is not clear whether Justice Thomas regards confessions as being a subset of "formalized testimonial materials"; if so, it is not clear why, because confessions can be very informal, and if not, it is not clear why the two sets, "formalized testimonial materials" and "confessions," should be deemed to constitute the overall class of testimonial statements.

⁵⁴ *E.g.*, *People v. Jimenez*, No. B164534, 2004 WL 1832719, at *11 (Cal. Ct. App. Aug. 17, 2004), *review denied*, 2004 WL 1832719 (Nov. 17, 2004), *cert. denied*, 125 S. Ct. 1713 (2005). *See also* *Mungo v. Duncan*, 393 F.3d 327, 336-37 n.9 (2d Cir. 2004) (dictum).

⁵⁵ 541 U.S. at 51 (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

⁵⁶ 541 U.S. at 51.

⁵⁷ *Id.* at 51-52 (citing *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

In short, nothing in *Crawford* compels the conclusion that only formal statements can be deemed to be testimonial. And courts should not adopt such a rule, most importantly because it makes no sense. Consider this exchange:⁵⁸

Police Officer: Please have a cup of coffee and make yourself comfortable. If that chair is too hard, please let me know and I'll get you a cushion.

Witness: Thanks so much. The chair is fine, but I'd love some milk if you have it.

Officer: Sure. Here you go. You know, I'm collecting evidence for the trial of Suspect on robbery charges. I know you'll find it inconvenient and unpleasant to testify in court, so why don't you tell me everything you remember, and then I'll tell the jury everything you've told me. We can do this very informally. In fact, I'm not even going to take notes. So just start talking whenever you're ready.

Witness: OK. Well, I was just walking down Main Street, minding my own business . . .

It seems to me clear that this statement is testimonial. Clearly, Witness is making a statement with the anticipation that it will be used in prosecution and (if it mattered, which of course I do not think it should) Officer understands that as well. But just as clearly, the statement seems informal – or, alternatively, it cannot be considered formal without robbing that term of all meaning. Finally, it seems obvious that this type of statement should not be admitted against Suspect if he never has an opportunity to cross-examine Witness. And – here is the crucial part – it is inadmissible not despite the lack of formality but, one may say, in large part because of it.

What formalities is this statement missing? Most notable are the presence of the accused and the opportunity for him to cross-examine. Those, of course, are the essence of the confrontation right. Clearly, the logic could not be that because of their absence the statement is informal and therefore the confrontation right does not apply, because that is a Catch-22 that would prevent the right from ever applying. Apart from those two, the most obvious formality is the oath. But we already know from *Crawford* itself that the absence of the oath will not make the statement non-testimonial; the majority

⁵⁸ I could make the same point by using the actual situation addressed by the decision of the Sixth Circuit in *United States v. Cromer*, 389 F.3d 662, 666-68 (6th Cir. 2004), which rejected a formality requirement. *Id.* at 673-74.

opinion was quite explicit on this point,⁵⁹ and the statement at issue in that case was not given under oath. There are other formalities as well that usually accompany testimony – the question-and-answer format and the general ceremonial nature of the courtroom – but these are of lesser importance; I have already explained in Part VIII why I do not believe interrogation is necessary to make a statement testimonial.

In short, the absence of formalities does not render a statement non-testimonial; rather, the absence of the most important formalities may make unacceptable as evidence a statement that is testimonial in nature. This casts a helpful light on dictionary definitions, like the one quoted by *Crawford*, that include formality as a component of testimony: Formality is an ideal, an aspect of testimony given in the optimal way, at trial in open court. The purpose of the Confrontation Clause, indeed, is to ensure that testimony be given in an acceptably formal way, in the presence of the accused and subject to cross-examination, and if reasonably possible at an open trial. To say that the absence of formality takes a statement that would otherwise be deemed testimonial outside the purview of the Clause would be to treat a defect of the statement as a virtue. It would also give investigating officers precisely the wrong incentive. They would tend to avoid whatever procedure is deemed to be a critical aspect of formality, so that statements given to them in full anticipation of evidentiary use would then be deemed non-testimonial and outside the rule of *Crawford*.

Once again, simply because this factor, formality, is not required to make a statement testimonial does not mean that it is irrelevant in determining whether the statement is testimonial – that is, roughly speaking, that it was made in anticipation of prosecutorial use. For example, in *Crawford* the statement was videotaped, with an introduction by the investigating officer that left no doubt about why the statement was being taped. But when a witness to a completed crime knowingly makes a statement to the police or other authorities describing the crime, the statement should be deemed testimonial, no matter how informally it was taken, because the likely evidentiary use is so clear. The presence of formalities can reinforce that determination, but they are not necessary to it.

⁵⁹ See *Crawford*, 541 U.S. at 52-53 n.3 ("We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK.") (emphasis in original).

X. EXCITED TESTIMONY

Before *Crawford*, the decision in *White v. Illinois*,⁶⁰ treating the hearsay exception for spontaneous declarations as a “firmly rooted” one for purposes of applying the reliability test of *Roberts* and holding that the unavailability requirement of *Roberts* did not apply to them,⁶¹ gave a green light to prosecutors and courts to try cases by introducing statements made in 911 calls and to responding officers, even if the declarant did not testify. This is a practice that Bridget McCormack and I have called “dial-in testimony.”⁶²

Allowing this kind of evidence made it possible to try domestic violence cases by using the complainant’s description of the incident, even without the complainant having testified in front of the accused. Many courts and prosecutors engaged in domestic violence cases give this practice a euphemistic name – “evidence-based prosecutions” – that is extraordinarily ironic, like the names of the Ministries of Love, Peace, and Truth in 1984: These prosecutions are most notable for the critical evidence that they *lack*, testimony given by the complainant subject to cross-examination. Since *Crawford*, many courts have continued operating essentially as they did before. Indeed, I believe that some courts and prosecutors who are actively engaged in domestic violence cases, determined to maintain the practice, have adopted a “draw the wagons” approach.⁶³

I believe a sensible view recognizes that just because a declarant is excited does not mean that the statement was not

⁶⁰ 502 U.S. 346 (1992).

⁶¹ *Id.* at 356-58.

⁶² See generally Friedman & McCormack, *Dial-In*, *supra* note 9, *passim*.

⁶³ For example, consider what happened when the National Council of Juvenile and Family Court Judges published in its journal *Juvenile Justice Today* an article by two Florida judges saying that courts could essentially ignore *Crawford* by invoking the excited utterance exception to the rule against hearsay. Amy Karan & David M. Gersten, *Domestic Violence Hearsay Exceptions in the Wake of Crawford v. Washington*, 13 JUVENILE & FAMILY JUSTICE TODAY, No. 2, at 20 (Summer 2004). Bridget McCormack, Jeff Fisher, and I, believing this article reflected a misleading ruling of *Crawford* that would eventually lead to many reversed convictions, wrote a response. The Council has refused to publish this article; it has said that its tone would be insulting to the judges who are valued members of the organization. We have expressed mystification about this contention, and have offered to adjust the tone to whatever extent necessary, but the Council has declined to change its decision. It is hard for me to perceive this decision as anything but censorship of views the Council finds unacceptable. A link to our essay is posted on The Confrontation Blog under the title A Case of Censorship?, <http://confrontationright.blogspot.com/> (Feb. 15, 2005, 17:15 EST).

testimonial in nature. *Crawford* supports this view. In footnote 8, the Court said that "to the extent the hearsay exception for spontaneous declarations existed at all [at the time the Sixth Amendment was adopted], it required that the statements be made 'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.'"⁶⁴ In other words, it may be that there was no exception at all for spontaneous declarations; it may be that statements made contemporaneously with the events at issue were admitted only on non-hearsay grounds, as part of the events being litigated – as part of the *res gestae*, in the phrase usually now considered discredited. Certainly, nothing like the latter-day exception for excited utterances existed – and the reason presumably was recognition that narrative statements by victims of completed crimes almost certainly are made with anticipation of prosecutorial use, even though they may be made for other purposes as well.

I believe 911 calls provide some very close decisions; statements to responding officers are almost universally testimonial. I will adhere to the summary that Bridget McCormack and I have previously provided:

The more the statement narrates events, rather than merely asking for help, the more likely it is to be considered testimonial.

Thus, if any significant time has passed since the events it describes, the statement is probably testimonial. When, as is often the case, the 911 call consists largely of a series of questions by the operator, and responses by the caller, concerning not only the current incident but the history of the relationship, the caller's statements should be considered testimonial. When O.J. Simpson called 911 to report an assault by his girlfriend, his call was testimonial, not a plea for urgent protection.

Often, of course, a 911 call is such a plea. Even in this type of situation, a court should closely scrutinize the call. To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert. If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what

⁶⁴ 541 U.S. at 58 n.8 (quoting *Thompson v. Trevanion*, 90 Eng. Rep. 179 (K.B. 1694)).

has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial.⁶⁵

XI. CHILDREN

Children presented some of the most difficult issues under the *Roberts* regime, and they will continue to do so under *Crawford*. In a pre-*Crawford* article, I have discussed at some length how a testimonial approach might apply to children's statements in various contexts.⁶⁶ Here I will offer only some brief comments; I freely admit that my thought in this area remains unsettled.

I tend to believe that some very young children should be considered incapable of being witnesses for Confrontation Clause purposes. Their understanding is so undeveloped that their words ought to be considered more like the bark of a bloodhound than like the testimony of an adult witness. And perhaps, in accordance with Sherman Clark's theory, we should consider that morally they are so undeveloped that we do not want to impose on them the responsibility of being witnesses.⁶⁷

Even assuming a child is considered capable of being a witness, there remains the question of whether a particular statement should be considered testimonial. Here, the question of whether to take an objective or subjective view in determining whether a statement is testimonial becomes important. If the matter is viewed objectively, it probably does not make much sense to apply a "reasonable child" standard, and some courts that have confronted the issue have declined to do so.⁶⁸ That is, an objective standard puts aside the

⁶⁵ Friedman & McCormack, *Dial-In*, *supra* note 9, at 1242-43.

⁶⁶ Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243 (Winter 2002).

⁶⁷ See Clark, *supra* note 36, at 1280-85.

⁶⁸ *People v. Sisavath*, 13 Cal. Rptr. 3d 753, 758 n.3 (Ct. App. 2004) (holding that, though *Crawford's* reference to an "objective witness" could mean "an objective witness in the same category of persons as the actual witness – here, an objective four year old," the more likely meaning is "that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial."); *State v. Grace*, 111 P.3d 28, 38 (Haw. Ct. App. 2005); *but see State v. Scacchetti*, 690 N.W.2d 393, 396 (Minn. App. 2005), *review granted* (Minn. Mar. 29, 2005) (holding that to invoke *Crawford* the defendant must show that "the circumstances surrounding the contested statements led the [child victim] to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have

particular incapacities of the given declarant, and it is not clear why youth and immaturity should be treated differently from other incapacities. On the other hand, there is something a little odd about asking, with respect to a statement by a young child, what the anticipation of a reasonable adult would be. If a subjective test is used, I do not believe the proper question for children should be whether the child anticipated prosecutorial use in the sense of the formal procedures of the criminal justice system. It should be enough if the child understood that she was reporting wrongdoing and that some adverse consequences – including that Mommy would get mad – would be visited on the wrongdoer.

Another wrinkle is worth considering if a subjective test is used, embellishing it with an estoppel rule: An investigator should not be able to withhold information about the likely use of the statement gratuitously for the purpose of being able to contend that the statement was made without testimonial understanding.⁶⁹ That rule seems to me to be correct as a matter of principle; whether it would be sensibly applied is another matter.

XII. CONCLUSION

The question of whether a statement should be deemed to be testimonial will provide many interesting and perplexing issues over the next several years (fodder for Evidence exams!) and it will continue to provide at least many close factual issues long after that. But the existence of all these open questions, and the possibility of treating them in a wide range of ways, should not lead us to believe that *Crawford* is anywhere near as manipulable as *Roberts* was, or that it did not represent a great and beneficial development. *Roberts* did not articulate a doctrine worthy of respect, and so

that expectation.”); *In re D.L.*, No. 84643, 2005 WL 1119809, at *3 (Ohio Ct. App. May 12, 2005).

⁶⁹ Suppose an investigator has no reasonable fear that revealing to the child that she is looking into wrongdoing would inhibit the child from speaking, and yet she declines to make the revelation so that the state can contend that the child did not anticipate punitive use of her statement. In that case, the estoppel rule would apply. On the other hand, an undercover police officer could decline to reveal her role to a conspirator without invoking the estoppel rule, because given such a revelation the conspirator presumably would not make statements useful to the officer.

manipulation was inevitable.⁷⁰ *Crawford* comes at least close to articulating the fundamental principle underlying the Confrontation Clause, a principle at the heart of our criminal justice system – that if a witness testifies against an accused, she must do so face to face, subject to oath and cross-examination. *Crawford* instantly made easy some cases – like that of Michael Crawford himself – that had divided the lower courts. If the Supreme Court continues to hold the line, lower courts will have to listen. They will realize that there is a wide range of conceivable ways in which witnesses can testify – some formal, others not; some to government officers, others not; some in response to questioning, others not; some after calm reflection, others not. The Confrontation Clause has a simple but strong demand: Prosecution testimony must be given face to face with the accused, subject to cross-examination.

⁷⁰ Acknowledging “interim uncertainty” created by its adoption of a new standard, the *Crawford* Court noted that “the *Roberts* test is inherently, and therefore permanently, unpredictable.” 541 U.S. at 68 n.10.